[*Editorial Note*: We reproduce below the supporting judgment of Mahadev Shankar JCA which was received after the publication of the report at [1997] 2 MLJ 11.]

Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors

Arah Cipta Sdn Bhd v Kian Kee Sawmills (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-407-95 AND W-02-646-95
SHAIK DAUD, MAHADEV SHANKAR AND ABU MANSOR JJCA
2 SEPTEMBER 1996

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47
BSB Holdings, Re [1992] BCC 915
Chi Liung Holdings Sdn Bhd v Attorney General [1994] 2 SLR 354
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah [1995] 1 MLJ 193
Mooney & Ors v Peat Marwick Mitchell & Co & Anor [1967] 1 MLJ 87
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211

Legislation referred to

Contracts Act 1950 ss 33, 52
Rules of the High Court 1980 O 15 r 6, O 18 r 19(1)(a), O 92 r 4
Specific Relief Act 1950 ss 17, 19

Civil Appeal No W-02-407-95 (The first appeal)

Mahadev Shankar JCA: This matter concerns an action filed by the appellants/plaintiffs to enforce an agreement for the sale of land. The learned trial judge struck it out on the ground that the statement of claim did not disclose a cause of action against the first defendant and that the other defendants had all been unnecessarily dragged into a dispute with which they were in no way legally involved. We allowed the appeal and directed that there should be an early trial. Our decision was unanimous. As will soon be apparent, this was not such a plain and obvious case which merited the sudden death verdict which the defendants' counsel persuaded the trial judge to inflict upon the plaintiffs.

The first defendant ('the vendor') is the registered owner of 25 plus acres of land in Ulu Klang ('the land'). It was ripe for development. The third defendant ('Datin Chong') is in sole control of the vendor and has been described as the vendor's alter ego. Kian Kee Sawmills (M) Sdn Bhd (the vendor) is therefore just the corporate veil behind which she operates.

In November 1984, the vendor charged the land to the second defendant ('the bank') for a loan of RM7m to one Ong Chin Seong and Shee Koon Ruay ('Loan 337'). In April 1985, the vendor again charged the land to the bank for a loan of RM11m to Datin Chong ('Loan 365'). These were third party charges ('the charges'). The borrowers had therefore a personal liability to repay these loans to the bank. In addition, the bank had recourse to the persons who had agreed to act as their guarantors. The vendor's liability to the bank was thus a collateral one, restricted to the market value of the land. Another encumbrance on the land was a caveat ('the caveat') lodged by Dato' Hj Wan Mahmood bin Pawan Teh on 27 November 1992.

In May 1994, the personalities in control of the vendor and the first plaintiff ('the purchaser') reached an agreement in principle whereby the land would be sold by the vendor to the purchaser under an arrangement whereby in return for a fixed sum to be paid by the purchaser, the bank would discharge the two charges and agree to the land being transferred to the purchaser free of the said charges. Other arrangements were to be made whereby the balance of Loan 337 and Loan 365, over and above the fixed sum, would be settled as between the borrowers and guarantors on the one hand and the bank on the other. The vendor also undertook to have the caveat removed at its own expense. The purchaser's profit in this exercise was to come from the sale of the completed residential housing units to be developed on the land. The vendor's gain after the completion of this exercise was RM3.9m of housing units plus a payment up-front of RM100,000 in cash after the bank's requirements had been finalized. The success of this scheme depended upon the co-operation of all the parties involved.

These intentions were fleshed out into legal obligations in a formal sale and purchase agreement ('the sale agreement') in writing dated 2 June 1994. The purchase price was RM17m. It was conditional upon Foreign Investment Committee ('FIC') approval being obtained and upon the bank's consent and confirmation that the amount the bank agreed to accept to redeem the said charges would not exceed the purchase price. The bank was to indicate this in a document described as 'the redemption confirmation'. The purchase price was to be paid in one lump sum to the vendor's solicitors before 2 December 1994 or one month after the receipt of the FIC approval whichever was the later ('the completion date').

On 2 June 1994, the vendor and the purchaser also entered into a supplemental agreement ('the supplemental agreement'). This was to provide the vendor with the means to discharge the caveat. Under it, the purchaser had to pay — as an additional purchase price — RM4m in the following manner: RM100,000 was to be paid to the vendor's solicitors as stakeholder upon execution of the supplemental agreement *and* subject to the redemption confirmation. The sum of RM3.9m was to be paid in kind in the form of residential housing units when completed on the land.

The sale agreement and supplemental agreement required the fulfilment of reciprocal promises by all the parties involved. The borrowers had earlier appointed the purchaser to negotiate the quantification of the said charges. By letter dated 11 May 1994, the purchaser proposed to the

bank that this should be RM16m. The borrowers, guarantors and Datin Chong signified to the bank their consent to the terms of the sale agreement by a letter dated 31 May 1994. On 16 May 1994 and 2 June 1994, the vendor passed the required resolutions approving the sale and the supplemental agreements. The borrowers and guarantors also signed a written authority dated 31 May 1994 addressed to the bank in which they stated as follows:

> We, the undersigned hereby consent to the aforesaid sale and hereby authorize Arah Cipta Sdn Bhd to deal, negotiate and conclude with you ('the bank') on all matters relating to the determination of the final redemption sum due and payable to the bank in full and final settlement of the loan accounts under Datin Chong See Yeow, Mr Shee Koon Ruay and Mr Ong Chin Seong.

On 20 June 1994, the bank wrote a letter to the purchaser indicating its willingness to consider accepting RM16m as the redemption sum for the said charges, subject to a revaluation of the land. On the same day, the bank wrote to the borrowers that it was not prepared to accept RM16m in full settlement of the said loans. Thus, the personal liability of the borrowers was to continue.

The subsequent revaluation by the bank showed that the RM16m was in excess of the market value of the land as did an independent revaluation by the vendor. The redemption sum was then renegotiated by the purchaser and vendor and reduced to RM15m. The sum of RM2m being the balance of the purchase price was agreed to be retained by the vendor's solicitors, Messrs Lim Soh Wah & Co, to account of conversion premium fees.

At this point, the purchaser gave formal written notice to the vendor that it had assigned its rights under the sale agreement to the second plaintiff, Dual Three (M) Sdn Bhd ('the assignee'). The vendor acquiesced in the notice of assignment but did not formally indicate its consent thereto. This assignment was therefore an equitable assignment requiring any action to be brought in both names. It is to be noted that cl 29.1(e) of the sale agreement specifically included the purchaser and its assigns.

By a letter dated 27 October 1994 addressed to the borrowers, the bank agreed to accept RM15m as the redemption sum for the said charges upon terms to be consented to by the borrowers. The FIC approval was obtained on 14 November 1994. Accordingly, the purchaser contended that the completion date for the sale agreement was fixed for 13 December 1994.

By a letter dated 23 November 1994, the purchaser's solicitors gave notice to the vendor's solicitors of its agreement to the bank's letter to the borrowers dated 27 October 1994 referred to earlier and also gave notice of its intention to implement the supplemental agreement by paying the RM100,000 required thereunder.

The vendor's response by letter dated 2 December 1994 was to contend that the sale agreement had lapsed. The purchaser's solicitors replied the same day refuting this and contended that the sale agreement was open for performance.

The following day, the vendor's solicitors terminated the sale agreement, contending that the bank's redemption statement did not fulfil the borrowers' requirements because payment of the RM15m would not extinguish the personal liability of the borrowers for the said loans.

The purchaser's solicitors challenged this by letters dated 16 December 1994 and 20 December 1994, giving notice of its intention to claim specific performance of the sale agreement and filed this action on 24 March 1985.

The purchaser's solicitors followed up on 10 April 1995 with:

(1) an application for an injunction to prevent the release of the title deed to the land by the bank; and

(2) an application for summary judgment.

On 18 April 1995, the vendor, Datin Chong and the fourth defendant filed an application to strike out this action. On 26 April 1995, Tan & Tan Development Sdn Bhd, the fifth defendant, and the sixth defendant also filed an application to strike out the action. The bank filed its application to strike on 2 May 1995. These applications were all supported by affidavit evidence since they were made under all limbs of O 18 r 19(1) and O 92 r 4 of the Rules of the High Court 1980. Affidavits were also filed in opposition by the purchaser's solicitors.

This is a convenient point to consider the activities of Datin Chong and the vendor between 2 June 1994 when the sale agreement and the supplemental agreement were signed, and 3 December 1994 when the vendor's solicitors repudiated the sale agreement. The purchaser's solicitors had no contemporaneous knowledge of these activities which only came to light after the repudiation and the discovery of certain other caveats filed against the land.

The fifth defendant ('Tan & Tan') filed its caveat on 25 November 1994, well before the vendor's solicitors repudiated the sale agreement on 3 December 1994. The sixth defendant which is an associate company of Tan & Tan, filed its caveat on 19 December 1994. The purchaser asserted that in October 1994, when the parties were still putting through the requirements of the sale agreement, the vendor and Datin Chong entered into an arrangement with the fourth defendant ('Bonanza'), Tan & Tan and the sixth defendant ('Harta') to sell the land to them. The purchaser's solicitors pleaded that that was done in breach of the vendor's warranties and covenants which were spelt out in cl 20.1(g) of the sale agreement. It reads as follows:

> (g) that it shall not hereafter mortgage, charge, transfer, sell, convey or otherwise deal with the said property so as to encumber, encroach upon or divest the purchaser of its rights, title and interest to the said property.

At the time of the filing of the statement of claim, owing to a lack of knowledge of the full circumstances of Datin Chong's role in this matter, the plaintiffs thought that subsequent to the bank's letter dated 27 October 1994, all the borrowers agreed to the bank's terms except Datin Chong who declined to give formal consent even though she was obliged to do so

A under the terms — express or implied — of the sale agreement. Paragraph 16 of the statement of claim was pleaded accordingly and the plaintiffs took the line that in law, she could be compelled to consent. By the time of the hearing on 5 June 1995, the factual position had become quite clear from the affidavits before the court. It was only in the course of the proceedings on that day, mid-stream as it were, the defendants chose to elect to B proceed on the basis of O 18 r 19(1)(a) alone. Tactically, they may have thought that this would have given them the advantage of shutting out the adverse material contained in these affidavits. One point especially requires emphasis. The plaintiffs' counsel submitted that there was clear evidence before the court that contrary to what was pleaded in para 16 of the claim, C Datin Chong had in fact consented to the bank's letter of 27 October 1994, and para 16 would be amended accordingly. He referred the court to the relevant passage in the White Book.

The relevant words in O 18 r 19(a) are:

> The Court *may* ... *order* to be struck out *or amended* any pleading ... on the D ground that —
>
> (a) it discloses no reasonable cause of action ... . (Emphasis added.)

The practice which should be followed in such cases is stated in *The Supreme Court Practice 1995* Vol 1 Part 1 at para 18/19/3:

E > ... Indeed, the court will generally give leave to amend a defect in pleading rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided.

None of the defendants challenged the assertion that Datin Chong had in fact consented to the bank's letter. Justice therefore requires that the trial F judge deem that para 16 had been amended and proceed to consider whether on an overview of the whole claim, the defendant's contention was not devoid of merit.

When the vendor's solicitors did not respond to the purchaser's solicitors' letter dated 23 November 1994 proposing the payments required to complete performance of the purchaser's covenants, the purchaser's G solicitors sent a reminder on 1 December 1994. By cl 4.1 of the sale agreement, the completion date had been extended by a further month to 2 January 1995.

On the basis that Datin Chong had also consented to the bank's terms in its letter dated 27 October 1994, the vendor's solicitors' letter H dated 2 December 1994 constituted a serious departure from acceptable standards of professional practice which merited an appropriate inquiry by the court into its full legal implications both on the enforceability of this contract and on its other aspects.

The fact that Datin Chong consented to the redemption letter is I brought out by her copy of the said letter which was referred to in para 12 of her first affidavit filed in this civil suit affirmed on 18 April 1995. The letter is marked exh DC7. It shows her signature along with the other borrowers. It also shows the bank's chop by way of proof that the bank received the consent of all the borrowers on 7 November 1994. Since Messrs Lim Soh Wah & Partners ('Lim') were the solicitors both for the

vendor and Datin Chong, the inference is irresistible that Lim knew of this. Lim's letters of 2 and 3 December 1994 when he repudiated liability cannot be reconciled with this knowledge which the purchaser contends he wilfully suppressed in order to fabricate an excuse for the repudiation.

Clause 2 of the sale agreement is headed CONDITION PRECEDENT. It reads as follows:

> 1 It is hereby expressly agreed between the parties hereto that this agreement and the sale and purchase herein contemplated is subject to and conditional upon:
>
> (a) the approval of the Foreign Investment Committee of Malaysia (hereinafter referred to as 'FIC approval') to the sale and purchase hereunder of the said property; and
>
> (b) the receipt of the consent from the chargee to the sale hereunder together with their confirmation that the redemption amount shall not exceed the purchase price.

The FIC approval was obtained on 14 November 1994. The bank's terms for consent to the sale together with its confirmation had been made known by its letter dated 27 October 1994. The purchasers were therefore entitled to contend that both conditions had been fulfilled and the vendor's solicitors had no business to contend otherwise as they did in their letter dated 2 December 1994.

Datin Chong was the alter ego of the vendor. The power of attorney given by the vendor to the purchaser authorized the purchaser to negotiate the redemption sum to clear the said charges. This the purchaser says it successfully completed with the bank's letter dated 27 October 1994. Datin Chong in her personal capacity was also a borrower. The bank required her consent to these arrangements and the plaintiffs' assertion was that she had given it. Accordingly, it was not open to the vendor to repudiate the sale agreement on 3 December 1994 on the ground that redemption sum was only going to be accepted as consideration for vacating the said charges and not also in full satisfaction of the outstanding loans to the borrowers. *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah* [1995] 1 MLJ 193 is ample authority in support of the purchaser's right to bring her to account.

The facts of this case as pleaded with the proposed amendment could not be controverted because the vendor's solicitors were relying on a non-event (ie the bank's alleged absence of consent) when the reverse was the truth. In any event, even if Datin Chong had refused to give consent, the contention was that she should not be allowed to rely on her own default to frustrate the agreement. So, even if unamended, the statement of claim raised triable issues.

But with the proposed amendment in place, the effect was to complete total fulfilment of cl 2(1)(b). The relevant words are:

> ... subject to and conditional upon:
>
> (a) ...
>
> (b) the receipt of the consent from the chargee ... .

A The clause does not identify the recipient. Since the bank elected to correspond on this matter only with the borrowers and the vendor, they must be held to be the recipients. The bank's consent was contingent upon the consent of the borrowers. Once the borrowers and Datin Chong had signed, the fulfilment of cl 2.1(b) became a reality, ie on 7 November 1994. With the FIC approval on 14 November 1994, both conditions had B been fulfilled to the knowledge of the vendor. I regret to say that unrebutted, the only conclusion possible is that Lim's letter of 3 December 1994 was a lie.

In short, the plaintiffs' claim was that the vendor's solicitors' repudiation of 3 December 1994 was dishonest and inspired by Datin C Chong's illegitimate dealings with Bonanza, Tan & Tan and Harta whilst the sale agreement was still in force. Since the purchaser had been led to expend considerable expense and energy in reliance of the vendor's warranties, the purchaser also claimed equitable estoppels in its favour.

In his judgment, the learned judge stated there were three conditions D agreed between the parties. In fact, there were only two conditions precedent in the sale agreement, ie the FIC approval and the bank's consent to the sale with the confirmation that the redemption amount to discharge the said charges should not exceed the sale price. The payment of RM100,000 cannot be treated as a condition precedent. It was never described as such. It was provided for in the supplemental agreement as 'part payment of the E additional purchase price' to the vendor's solicitors 'as stakeholders upon execution of this agreement *and subject* to the receipt of the consent' to the sale agreement from the bank. No time limit has been stipulated in the supplemental agreement as to when the consent should have been forthcoming. Even before the bank's letter was obtained, the purchaser's F solicitors had tendered this RM100,000 to the vendor's solicitors by letter dated 14 September 1994, but the vendor's solicitors did not accept it. In any case, it was never the vendor's solicitors' stand that they had repudiated the agreement for non-payment of this RM100,000. The repudiation on 3 December was based on the contention that the second condition precedent in cl 2(1)(a) had not been fulfilled.

G Relying on *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47, the vendor's counsel persuaded the learned trial judge to hold that:

> ... until the conditions are fulfilled, there can be no contract, there is no cause of action, and the whole case collapses not only against the first defendant but against all the defendants ... .

H On the facts of this case, it was highly arguable (and I need not put it any higher than that) that the sale agreement was not that kind of contract at all because it imposed mutual obligations on both parties by way of reciprocal promises and each party was required to use its best endeavours to assist the other party to ensure that the two hurdles in question were I surmounted. Even if para 16 of the claim was taken in its original state, the law stated in *Kim Lewison on the Interpretation of Contracts* at p 145 is:

> Where a contract is conditional, it is often implied that neither party will do anything to prevent fulfilment of the condition, and is sometimes implied that one of the parties will do his best to see that the condition is fulfilled.

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 is a Federal Court decision by which we are bound, and it is very much in point. As stated by Salleh Abas CJ (Malaya) at p 218:

> ... neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

The description 'condition precedent' in cl 2 was equivalent to the 'contingent condition' referred to in s 33(1) of the Contracts Act 1950 and it was quite erroneous to suggest that there was no contract. Here, there was a binding contract which was in no way dependent on the fulfilment of the two conditions which the parties had both agreed to bring about if at all possible. Only the performance of the vendor's obligation to sell and the purchaser's obligation to make the required payments were dependent on the fulfilment of the two contingencies (see *Chi Liung Holdings Sdn Bhd v Attorney General* [1994] 2 SLR 354). As s 33(2) of our Contracts Act 1950 provides:

> 33 (1) ...
>
> (2) If the event becomes impossible, such contracts become void.

Far from becoming impossible, the plaintiff's case was that by 27 October 1994 and 14 November 1994, both contingencies had been overcome and the liabilities of both vendor and seller were no longer inchoate. In other words, the contract was not null and void but available for performance. Section 52 of the Contracts Act 1950 thus came into play and one party was not bound to perform unless the reciprocal promisee was ready and willing to perform.

The position taken by the other defendants apart from the vendor was that because they were not parties to the sale agreement, the purchaser had no cause of action against them. So, the trial judge was persuaded to hold as follows:

> In any event, even if there is an extant contract between the first plaintiff and the first defendant, I fail to see how the five others could have been dragged in as defendants when they were not even parties to the contract entered into between the first plaintiff and the first defendant. It has to be noted that no relief was prayed for against the second, third and fourth defendants on the sale agreement. A prayer was requested for the removal of caveats lodged against the land by the fifth and sixth defendants, but no nexus is shown between these two defendants and the agreement entered into between the first plaintiff and the first defendant. I fail to see how the second plaintiff can figure in the litigation as well since he too was not a party to the contract. Encik Naraynan says the second plaintiff was nominated as recipient transferee of the said land and he points to para 15(c) of the statement of claim but, with respect, that pleading does not so state.

With respect, we think this was too narrow a view to take in all the circumstances of the case. The real question is whether these defendants were proper parties to the action. This claim was for specific performance of the contract for the transfer of the land to the purchaser. The bank had to be brought in because it was a chargee who had to be paid off and its consent was required for the sale. The other defendants were all involved

in the steps taken by Datin Chong to resile from the sale agreement and to create an adverse claim to the land which they had sought to protect by filing caveats against it. If the plaintiffs were to succeed to obtain specific performance, these people had to be made bound by the order so that the purchaser could get clear title. Besides, as against all of them, there was also a claim for damages for unlawful interference.

The relevant legal provisions requiring such other parties to be joined as defendants are ss 17 and 19 of the Specific Relief Act 1950, *The Sale and Purchase of Real Property in Malaysia* (1984) by Visu Sinnadurai at p 131, O 15 r 6 of the Rules of the High Court 1980 and *Re BSB Holdings* [1992] BCC 915. We do not need to analyse these authorities in depth here.

Quite correctly, the learned trial judge referred to *Mooney & Ors v Peat Marwick Mitchell & Co & Anor* [1967] 1 MLJ 87, but the misdirection occurred when he was persuaded to hold that there was no contract in existence here until the conditions are fulfilled and therefore no cause of action. Had the matter been viewed in the correct perspective, he should have held that there was a contract here which the plaintiffs were entitled to enforce if the two conditions had been fulfilled. The plaintiffs asserted they had been and they were entitled to enforce their rights. The defendants denied that the second condition had been fulfilled and that was eminently an issue to be tried because there was material before the court that it was fulfilled and that in any event, if it was not, that situation was brought about by the default of the first and third defendants. Putting it at its very lowest for the plaintiffs, there were very serious questions to be tried here and the trial judge should have given leave to amend and directed the action to proceed.

We ordered an early trial because very large sums of money are involved here and any undue delay can result in a dilution of the rights of the parties. We also ordered the costs of this appeal and in the court below to be taxed and paid by the respondents to the appellants.

In conclusion, it should not be overlooked that the vendor's application to strike out was not only on the basis of O 18 r 19 but also of O 92 r 3 of the Rules of High Court 1980. The inherent jurisdiction of the court thus invoked obliged the court to prevent an injustice to the plaintiff. This judgment is interlinked with the judgment I have written in W–02–646–95 which should be read along with this.

Appeal allowed.

Civil Appeal No W–02–646–95 (The second appeal)

Mahadev Shankar JCA: This matter is inter-related with my judgment in Civil Appeal No W–02–407–95, which contains the factual background. As in that judgment, I refer to the appellant and the respondent herein as the purchaser and vendor respectively and have used the same expressions in relation to the subject matter of the dispute.

After the vendor's solicitors repudiated the sale agreement on 3 December 1994, the purchaser lodged a caveat ('the purchaser's caveat')

on 28 February 1995 against the land claiming, inter alia, that it was entitled to specific performance. The purchaser then filed Civil Action No S1–22–101–1995 on 25 March 1995. A

The statement of claim was drafted in accordance with the facts then known to the purchaser. By 14 April 1995, the purchaser followed up with an application for an injunction to prevent the land from being further transacted and also an application for summary judgment. The defendants in the civil suit responded with applications to strike out the action under all limbs of O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 with affidavits being filed for and in support of these applications. B

When the trial judge struck out the suit on 29 June 1995, the purchaser's application for an injunction and the application for summary judgment fell to the ground. C

Only then did the vendor file an application (this application) on 30 June 1995 for the removal of the purchaser's caveat. It was supported by an affidavit of Datin Chong affirmed on 29 June 1995. The purchaser filed fresh affidavits in opposition and also relied on the affidavits filed by the parties in the civil suit. D

Since all the material evidence was now before the High Court, its vision was not blinkered by the vendor's tactical switch in the civil suit which was calculated to shut out the full implications of the activities of Datin Chong and her legal advisors at the material time. E

The trial judge heard this application on 8 July 1995, and gave his decision on 25 September 1995. The trial judge was thereby put in a invidious position because having dismissed the action earlier, he was left no choice but to order the removal of the caveat. However, the purchaser's appeal in the civil suit had already been filed, and the trial judge granted a stay of execution pending the disposal of that appeal and the proposed appeal against his order directing removal of the caveat. This is the appeal which is now before us. F

Since we have allowed the appeal in the civil suit, it is axiomatic that the purchaser's caveat should remain until the final disposal thereof. However, there are some very unsavoury features which have emerged on the uncontested evidence before us which makes it very plain and obvious that there are serious questions to be tried in the civil suit. G

Clause 20 of the sale agreement spelt out several warranties and covenants on the part of the vendor whose alter ego was Datin Chong. In particular, cl 20.1(g) provided as follows: H

> (g) that it shall not hereafter mortgage, charge, transfer, sell, convey or otherwise deal with the said property so as to encumber, encroach upon or divest the purchaser of its rights, title and interest to the said property; ... .

I

And cl 8.2 of the sale agreement reads as follows:

> The parties hereby convenant and undertake to execute all documents and do all acts and use its best endeavours to procure the registration of the said transfer of the said property into the name of the purchaser.

A It will be recollected that whilst the sale agreement was current, the bank consented to accept RM15m as consideration for the redemption and sent out the confirmation letter on 27 October 1994 ('the redemption letter') to the borrowers. To become effective, this letter required the acceptance of the borrowers — Ong Chin Leong and Shen Koon Ruay for
B Loan 337 and Datin Chong for Loan 365.

Datin Chong's solicitor at the material time was Lim Soh Wah ('Lim'). On 5 November 1994, Lim wrote to the purchaser's solicitors that the redemption letter had been received but said that the bank's terms 'may not be acceptable to the borrowers and the vendor'.

C Unbeknown to the purchaser or its solicitors, the true position on or about 5 November 1994 was that all the borrowers had in fact agreed to all the bank's terms. This is clearly brought out by Datin Chong's copy of the redemption letter which shows that she and the other two borrowers had signed the redemption letter on same date prior to 7 November 1994. The redemption letter was received by the bank on 7 November 1994 as
D proven by the bank's received chop which appears on her copy of the letter. The irresistible inference is that Datin Chong, Lim, and the bank all knew that the second condition had been fulfilled on that day!

The purchaser's solicitors wrote on 23 November 1994 requesting for performance on the basis of the bank's redemption letter and also
E indicated that the RM100,000 had been deposited with them ready to be paid over on the vendor's acceptance of the bank's terms. On 17 October 1994, the purchaser's solicitors had already sent Lim all the documents required to be executed for the transfer to be put through, but Lim said he would keep these in abeyance. With full knowledge of the fulfilment of the second condition on 7 November 1994, Lim and Datin Chong sat on all
F the documents and deliberately suppressed the information about the receipt of the redemption letter from the purchaser's solicitors. On 1 December 1994, the purchaser's solicitors sent an urgent reminder. Lim's response by letter dated 2 December 1994 amounted to a false misrepresentation. He stated:

G > The termination date agreed by the parties has recently passed. May we please know whether your client has complied with the conditions precedent in cl 2.1 within the time agreed in cl 2.2? If your client has, we ask that that documentary proof of compliance be furnished to us at the latest by the close of business today.

H The documentary proof he required of the redemption statement had to his knowledge been furnished to the bank on 7 November 1994 and he and Datin Chong both must have known this. Nevertheless, he proceeded to repudiate on 3 December 1994 knowing that his client had agreed to the redemption statement as indeed she was legally obliged to do. In the absence of a satisfactory explanation from Lim and Datin Chong, the
I misrepresentation may also be fraudulent.

The truth only came out when Datin Chong filed her affidavit in the civil suit on 18 April 1995. She was now represented by Messrs Gooi & Co who disclosed her copy of the bank s redemption letter (see para 12 of her affidavit and exh DC 7).

The purchaser's solicitors' response when they were served with this affidavit was immediate. They wrote to Lim, enclosed a copy of Datin Chong's affidavit and exh DC7 and said:

...

(3) The assertion made in para 12 of the said affidavit including exh DC-7 comes as a suprise to our client's conveying solicitors, Messrs Zainal Abidin & Co that CCB's letter of 27 October 1994 had been executed by all borrowers and returned to CCB on 7 November 1994.

(4) Before our client proceeds any further, we are instructed by the same to enquire from you as to why the aforesaid execution was never disclosed to our client.

Lim took refuge in silence. His failure to explain this cries out for an explanation and may call for condemnation at the appropriate time. The purchaser's solicitors wrote to the bank's solicitors the same day along the same lines. At least, the bank's solicitors acknowledged receipt of the letter, said that they would revert on obtaining instructions, but never did.

Again, on the uncontested evidence, there is proof before the court that on 3 October 1994, Datin Chong as the alter ego of the vendor signed a sale and purchase agreement for the sale of the land to Bonanza at RM15 m. On 27 October 1994, Datin Chong's solicitors who were also acting for Bonanza gave Tan & Tan an option to buy the land for RM27m. Having purportedly repudiated the sale agreement on 3 December 1994, on 12 December 1994 the vendor, through Datin Chong, entered a deed of revocation with Bonanza and the same day entered into a substituted agreement for the sale of the land to Harta Villa on the same terms as agreed with Bonanza. Harta Villa is a subsidiary of Tan & Tan.

This conduct of the vendor/Datin Chong as its alter ego, aided and abetted by Lim, was in flagrant breach of cl 20.1 (g) of the sale agreement. Other epithets for this behaviour must await a full trial of the action when the respective roles played by Datin Chong and Lim and even possibly the officer in the bank who had the conduct of this matter becomes clearer.

Following Mr Lim Kean Chye who appeared for the vendor the previous day, Ms Selvi Sandrasegaram said: 'We do not dispute that we were caught gazumping'.

The *Concise Oxford Dictionary* defines 'gazump' as:

(1) raising the price of property after having accepted an offer by an intending buyer; (2) swindle.

For the time being, I will content myself by observing that the sale agreement was a concluded contingent contract for which ample consideration had been given. Furthermore, there was an express undertaking that the vendor would not indulge in any other dealing whatsoever with the land.

The only contention that the vendor's counsel could muster in support of the acts of the vendor and Datin Chong was that they were under no duty to get the bank's consent and that since the buyer had not

done so, the sale agreement had lapsed! At best, this is an argument which goes to defending or mitigating the conduct of the vendor. It does not detract even one iota that the purchaser has raised very serious questions to be tried in the civil suit to which the purchaser's caveat is hinged. As I have pointed out in the earlier judgment, cl 2(1) does not say the purchaser must get the consent and produce it to the vendor. It says that the condition is fulfilled when the consent is *received*. It was received on 7 November by the bank. The trial judge can be left to draw his own conclusions from the fact that as on 7 November 1994, the redemption statement was a reality to the knowledge of the vendor and the bank, and that by 14 November 1994, the FIC approval was also to hand.

So we allowed this appeal with costs to the appellant both here and in the court below and directed that the purchaser's caveat do remain until the final disposal of the action.

For the sake of completeness, I should mention that we had a third appeal W–02–639–95 in which the vendor had appealed against the stay of execution granted by the trial judge. This was withdrawn and we struck it out with no order as to costs.

For the avoidance of the kind of situation which arose here, I would state it as my opinion that in all future cases where an aggrieved party is applying for a removal of a caveat on the ground that the suit filed in pursuance thereof does not disclose a cause of action, the application for removal should be heard at the same time as the application to strike out because the whole basis of the caveat is the suit which has been filed and neither can be permitted to remain unless the caveat raises serious questions to be tried which have also been made issues in the action.

Appeal allowed.